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IN THE

Supreme Court of the United States

October Term, 1964
No. 881

EUGENE ALEXANDER GRAHAM, JR.,
Defendant and Petitioner,

vs.

STATE OF CALIFORNIA, *et al.*,
Plaintiff.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the United States and to the Associate Justices of the Supreme Court:

Statement of Jurisdiction.

The appellant submits herewith his statement disclosing the basis upon which the Court has jurisdiction to review the judgment of the Appellate Department of the Superior Court in which no appeal could be taken from the decision of this Court to the District Court of Appeals of the state of California. The judgment of the Appellate Department of the Superior Court affirming a judgment of the Los Angeles Municipal Court, the judgment of the Appellate Department being without opinion.

Decisions and Opinions Below.

The judgment of conviction in the Municipal Court of the County of Los Angeles, Los Angeles Judicial District, is included in the Clerk's Transcript page 22 and in the Municipal Court Clerk's transcript of docket commencing page 12; the judgment and decision of the Appellate Department page 82.

I.

Jurisdiction.

The jurisdiction of this Court is conferred by 28 U.S.C.A. Sec. 1257(2). This is a petition for review of a conviction in the Municipal Court of the County of Los Angeles, Los Angeles Judicial District, charging the defendant and appellant with a violation of Section 21658 of the Vehicle Code of the State of California, commonly called an unsafe change of lane. The conviction was after trial by jury, the first jury trial having ended in a hung jury and the second jury trial resulting in a conviction. Defendant and appellant then appealed to the Appellate Department of the Superior Court in and for the County of Los Angeles. The appellant's appeal was denied without opinion. Thereafter the defendant filed petition for re-hearing [Clk. Tr. p. 83] with application for certification to the District Court of Appeals in the event of denial of the order for re-hearing. Both the petitions for re-hearing and the petition for certification to the District Court of Appeals were denied [Clk. Tr. p. 88].

The appellant and petitioner herein contends that, as will be set forth in detail, his constitutional rights under the Fourteenth Amendment to the Constitution of the United States involving due process and equal protection

of the laws were violated in the quashing of subpoenas and the discharging of witnesses called by the defendant on his behalf; that in denying admission into evidence of documentary items, to wit, the traffic citation, defendant and appellant was further denied due process and equal protection. And finally that in sentencing the appellant and petitoner, appellant and petitioner was sentenced for alleged action in connection with issuance of subpoenas for which he had not been charged in the complaint or information and that this was a violation of due process.

II.

Cases Believed to Sustain the Jurisdiction of the Court.

The appellant petitioners have been denied due process of law in the primary sense in that they have not been given a full opportunity to present their case before the proper court.

Crane v. Hahlo, 258 U.S. 142, 145;
Chicago v. Chicago, 166 U.S. 226;
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Brinkerhoff v. Hill, 281 U.S. 673, 682;
Shelley v. Kramer, 334 U.S. 1;
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North Carolina v. Zachary, 232 U.S. 248, 259;
Fayer Weather v. Ritch, 195 U.S. 276, 297;

Hovey v. Elliot, 167 U.S. 409, 416, 417, 418;
Ex parte Virginia, 100 U.S. 339, 348;
Scott v. McNeil, 154 U.S. 34, 45, 46;
Great Northern Railway v. Washington, 300 U.S. 154, 167:
Dower v. Richards, 151 U.S. 658.

III.

Statement.

Defendant was cited on February 8, 1964, for an alleged violation of Subsection (a) of Section 21658 of the Vehicle Code of the State of California, commonly called an unsafe change of lane. Defendant posted $22.00 cash bail and requested trial by jury.

The case came on originally for trial in Division 21 of the Los Angeles Municipal Court on March 25, 1964, before the Honorable James P. Tante. Trial was had and the jury was unable to agree resulting in Judge Tante declaring a mistrial.

Testifying for the defendant at this trial as reflected by the Court Clerk's minutes were Orville Farley, Jay Morris, Henry Espinoza and the defendant. The Clerk's record shows other witnesses were subpoenaed, but because of stipulations arrived at in open court, witnesses did not testify.

On April 27, 1964, the second trial, the subject of this appeal commenced in Division 22 of the Los Angeles Municipal Court with the defendant a second time representing himself *in propria persona.* The defendant was only defense witness in this trial.

The Court acting on its own initiative and before any evidence was taken excused Mr. Jay Morris, a represen-

tative of the State Department of Motor Vehicles. After identification of other witnesses after commencement of trial, the Court quashed subpoenas for the remaining witness subpoenaed by the defendant.

This trial ended with jury finding the defendant guilty and Judge Allan G. Campbell sentencing the defendant to five days in the County jail.

Questions Presented.

The questions presented here are based upon violation of due process of law in the trial court. The 14th Amendment to the Constitution of the United States requires that every defendant in a criminal case be accorded due process of law. The procedural aspects of due process have long since been defined as the right to have witnesses on his behalf to appear and testify. The Court has discretion in permitting witnesses to testify when there is question of materiality, but where their testimony is essential and material, to deny the defendant the benefit of the testimony without as much as permitting the witnesses to be called is an abuse of discretion and a violation of due process.

It is well settled that the accused proceeding in a jury trial be accorded the right to present evidence on his behalf designed to show that he is not guilty of the offense charged. The right to present evidence on his behalf within the limits of admissible evidence is absolute. The denial of the right to show bias or prejudice on the part of the officer making an arrest, by the acts of the officer, mistakes or otherwise, would certainly seem to be admissible by any test. The rejection of this evidence by the trial court would therefore be an abuse

of discretion allowed in the admission of evidence and therefore a violation of due process.

The defendant in every criminal proceeding before a jury is entitled to have the benefit of an impartial trial court. To expect a defendant to try a case before a jury of persons who were hostile and prejudiced could not be considered due process in any form. Here the Court, at every opportunity, made it a point to undermine any defense the defendant was attempting to establish. In any traffic violation where the only evidence of the act constituting the violation is one officer testifying from his memory, it would seem that justice and due process would require the defendant be allowed every latitude in showing that the testimony of the officer was motivated by attitudes not involved in the observation of an alleged act which constituted a violation. Therefore the action of the Court would be an abuse of discretion in commenting on the case and the evidence, and restricting evidence improperly, thereby denying defendant due process.

The Court here, in sentencing the defendant, proposed to punish the defendant not only for the alleged traffic violation, but also for an abuse of process in subpoenaing witnesses that the court did not permit to testify. The Court in imposing the sentence based upon a matter not involved in the complaint, and a matter upon which the defendant had not been formally arraigned and not had an opportunity to defend was an abuse of discretion and a violation of due process.

Had the Court decided that the acts of the defendant in subpoenaing the witnesses was improper and wanted to hold him in contempt of court, this would have been

subject to a trial. Under every rule of procedural due process the punishment for this so called abuse of process was unconstitutional.

There is no place in the record or any portion of the record which in any way mentions the defendant's driving record as warranting the kind of punitive action taken. The sole reference at this time was to the alleged abuse of process and the Judge was kind enough to make the fact abundantly clear, when he stated, for the record, R. T. Vol. II, p. 10,

> "The court has avowedly taken these matters into consideration, they may be fully before the Appellate Department of the Superior Court for consideration there."

Conclusion.

It is respectfully submitted that important constitutional questions have been raised in this case deserving of the consideration of the court and upon opportunity of the court to consider full brief and full argument, the protection of the constitutional rights of the petitioner.

Respectfully submitted,

THOMAS G. NEUSOM,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 881

EUGENE ALEXANDER GRAHAM, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

Statement of the Case.

Petitioner was convicted in the Municipal Court of the Los Angeles Judicial District, State of California, of a violation of subdivision 2 of Section 21658 of the California Vehicle Code. Petitioner appealed from the judgment of conviction to the Appellate Department of the Superior Court for Los Angeles County. That court affirmed the judgment without written opinion. Petitioner then filed a petition for rehearing and for certification to the District Court of Appeal. This petition was denied without opinion on November 9, 1964.

Issues Raised by the Petition.

Petitioner now seeks a writ of certiorari in this court on the ground that he was denied his constitutional rights of due process and equal protection af-

forded by the Fourteenth Amendment to the Constitution of the United States. His contention is based upon errors allegedly committed by the trial court in excluding certain evidence and errors committed during sentencing.

I.

The Refusal of the Trial Court to Permit Petitioner to Introduce Irrelevant and Immaterial Evidence Did Not Deny Him His Constitutional Rights of Due Process and Equal Protection.

Petitioner at the time of trial contended that the police officer made several errors while recording information on the traffic citation. These errors had nothing to do with the facts of the traffic violation. They concerned primarily the description of petitioner's vehicle and the number of passengers he was carrying. In order to prove the existence of these errors petitioner subpoenaed five witnesses to appear at the trial. The trial judge exhaustively examined these witnesses and determined they had been nowhere near the scene of the violation nor had they any knowledge of the facts surrounding the violation.

The court's searching examination further disclosed that two witnesses, Mr. Farley and Mr. Espinoza, could testify only that at a time and place distant from the scene of the violation, petitioner had been in the company of his wife and two children [R. T. p. 43, lines 13-26; p. 49, lines 5-26].* This testimony had nothing to do with the issue of the case and was "purely collateral" [R. T. p. 19, lines 1-2].

*R. T. refers to the reporter's transcript in its original page numbering.

Petitioner wished another witness to testify from Department of Motor Vehicle records to the number of doors on petitioner's vehicle and the date of its registration [R. T. p. 9, lines 10-17]. Another witness was to testify from the records of the City Engineer to the "make up" of the area (Petn. p. 40, lines 7-26; p. 41, lines 1-25).

The fifth and last witness, Mr. Reece, was excused when petitioner agreed his testimony was not material (Petn. p. 37, lines 4-5).

After determining the evidence each witness was to present to the jury, the trial court correctly ruled that such evidence was irrelevant, immaterial and constituted an attempt to impeach the officer's testimony on collateral matters. The court also properly refused to receive the traffic citation into evidence for the same reasons. (*People v. Dye*, 75 Cal. 108; *People v. McDaniel*, 59 Cal. App. 2d 672; *People v. Wells*, 33 Cal. 2d 330.)

Petitioner does not dispute the fact that as to the issue of the case (*i.e.*, whether he did or did not make an unsafe lane change) he was afforded the fullest opportunity to present any and all relevant evidence. Petitioner's only complaint pertains to the refusal to admit irrelevant and immaterial evidence. Clearly such a refusal did not violate his right of due process under the Fourteenth Amendment. (*Muser v. Magone*, 155 U.S. 240; California Constitution, Article VI, Sec. 4½; 28 U.S.C. Sec. 2111.)

II.

In Order That It May Be Said That Due Process of Law Has Been Denied to Petitioner, It Must Affirmatively Appear Not Only That the Trial Court Committed Error, but Further, That Such Error Was so Gross as to Amount to No Trial at All.

Assuming for the sake of argument that the trial court committed error by refusing to allow into evidence material which the court considered improper, nevertheless, such error would not raise a constitutional question within the meaning of the Fourteenth Amendment.

The Constitution of the United States does not guarantee to a defendant a trial free from error. Nor does the fact that such error is prejudicial necessarily transform an otherwise fair trial into one that offends the due process clause of the Fourteenth Amendment.

> "It does not do so unless it has the effect of converting what was otherwise a fair trial into one which is repugnant to an enlightened system of justice."
>
> *Vandergrift v. United States,* 313 F. 2d 93.

The alleged errors complained of even if true could hardly be said to have transformed petitioner's trial into one which was "repugnant to an enlightened system of justice."

Many criminal trials contain some error but this does not mean such error violates the constitutional rights of the person convicted.

Lisenba v. California, 314 U.S. 219.

> "An endeavor is made to magnify the error in these trials to constitutional proportions by asserting that the refusal of the proffered evidence robbed this trial of vitality by depriving defendants of their only real defense. But as much might be said of many rulings during a criminal trial. Defendants received throughout an opportunity to be heard and enjoyed all the procedural guarantees granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process."
>
> *Sunal v. Large,* 332 U.S. 174, 182.

The Supreme Court of the United States does not sit to review supposed errors of law in the admission or exclusion of evidence. Evidentiary questions are matters left to the states.

> *Chaplinsky v. New Hampshire,* 315 U.S. 568; *Jacobson v. Massachusetts,* 197 U.S. 11.

III.

In Considering What Shall Constitute an Appropriate Sentence the Trial Court Is Entitled to Consider a Wide Variety of Factors Including Information Concerning the Convicted Person's Life and Characteristics.

Petitioner contends that the trial court in sentencing him considered ". . . a matter upon which the defendant had not been formally arraigned . . ." (Petn. p. 6).

A similar contention was made in the case of *Williams v. Oklahoma,* 358 U.S. 576, and there the court held that,

> "Once the guilt of the accused has been properly established, the sentencing judge, in determining the

kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination of witnesses in open court but may consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out of court' information relating to the circumstances of the crime and to the convicted person's life and characteristics."

Williams v. New York, 337 U.S. 241.

IV.

Where the Trial Court Imposed a Sentence That Fell Within the Maximum Statutory Limits, the Petitioner Cannot Be Heard to Complain That Such Sentence Was Excessively Severe.

Petitioner contends "there is no place in the record or any portion of the record which in any way mentions the defendant's driving record as warranting this kind of punitive action taken." (Petn. p. 7, lines 4-7).

A sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense.

United States v. Pridgeon, 153 U.S. 48.

Within the statutory limit, the sentence imposed is exclusively within the discretion of the trial court.

Fienhercy v. United States, 2 F. 2d 955.

We must assume that the facts before the court justified the exercise of the court's discretion in the instant case.

V.

The Supreme Court of the United States Should Not Take Jurisdiction to Review a Judgment Where No Opinion Was Delivered by the Highest State Court, and Where Such Judgment Is Sustainable on Nonfederal Grounds.

No opinion was delivered by the highest state court that could review the judgment [R. T. p. 1].

In *Stembridge v. State of Georgia,* 343 U.S. 541, it was held that, where the highest court of the state delivers no opinion and it appears the judgment might have rested upon a nonfederal ground, this court will not take jurisdiction to review the judgment.

The judgment of the Appellate Department of the Superior Court as to petitioner's contentions that the exclusion of certain evidence deprived him of due process and that he had been improperly sentenced, could have rested on the nonfederal ground that these contentions were not raised in the trial court.

> "It is a general rule of appellate review early established and long adhered to, that questions not raised in the trial court will not be considered on appeal."
>
> *People v. Alvidrez,* 158 Cal. App. 2d 299, 300 P. 2d 557;
>
> *People v. Robinson,* 226 A.C.A. 798.

Conclusion.

The petition for writ of certiorari does not disclose that there has been a violation of petitioner's rights under the Federal Constitution nor that petitioner seasonably asserted the purported constitutional questions, nor that the highest court of the State of California passed upon a constitutional question in reaching its decision.

It is urged that petitioner presents no substantial question for decision by this court and that the petition should be denied.

Respectfully submitted,

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